

TEMPLATE MITIGATION BANKING INSTRUMENT

This is a template instrument for a single Mitigation Bank site. It is not a template for an umbrella Mitigation Bank.

The purpose of this template is to expedite review of the proposed instrument by the Mitigation Bank Review Team (MBRT) agencies. It is possible to deviate from the template, but any and all deviations should be clearly marked (highlighted or red-lined) to facilitate review.

The italicized text in this template is intended as instructions to the Sponsor and the MBRT members.

This Banking Instrument, which describes the establishment, use, operation, and maintenance of Wetlands Bank (hereinafter, the "Bank") is an agreement (the "Agreement") made and entered into by and among _____ (hereinafter, "Sponsor"), the U.S. Army Corps of Engineers ("Corps"), the U.S. Environmental Protection Agency ("EPA"), the U.S. Fish and Wildlife Service ("FWS"), the Virginia Department of Environmental Quality ("DEQ"), and the Virginia Marine Resources Commission ("VMRC").

I. PREAMBLE

A. Purpose: Whereas, the purpose of this Banking Instrument is to establish guidelines and responsibilities for the establishment, use, operation, and maintenance of the Bank. The Bank will be used for compensatory Mitigation for unavoidable impacts to waters of the United States including wetlands that result from activities authorized under Section 401 and 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act and Section 62.1-44.15:5 of the Code of Virginia provided such activities have met all applicable requirements and are authorized by the appropriate authority.

B. Goals and Objectives: Whereas, *Describe the goals and objectives of the Bank in terms of Functions and values, such as education/research, erosion control, fisheries/wildlife habitat, flood conveyance/flood storage, open space/aesthetics, recreation, rare or threatened and endangered species, water quality, etc. Goals and objectives should be expressed as acres of wetlands, vegetation type, and wetland classes (Cowardin or HGM classifications). The goals and objectives of any proposed buffer areas should be specified (to filter sediments, to protect the Mitigation site from adjacent development, etc.).*

C. Location and Ownership of Parcel: (1) Whereas, the Sponsor has entered into a Limited Liability Company Operating Agreement which requires _____ to own, acquire, or secure _____ acres of land in _____, Virginia, as shown on the vicinity map (Exhibit A) and as depicted on a plan prepared by _____, dated _____, (Exhibit B). Said parcels are hereinafter referred to as the "Property." (2) The Sponsor may elect to acquire additional lands in the _____ watershed by proposing a Bank Development Plan for each new parcel as an amendment to this Banking Instrument.

Provide a legal description of the Property that includes a reference to the Plat;

The Sponsor is required to obtain an inspection and Assurance of title and to demonstrate that there are no restrictions or encumbrances that will affect rights to develop the Property as planned and to place deed restrictions on the Property.

D. Project Description: Whereas, in accordance with this Banking Instrument, the Sponsor will establish and/or maintain aquatic habitats and upland buffers in compliance with the provisions of this Banking Instrument and the Bank Development Plan (Exhibit C), and shall then maintain each phase of the Bank in such condition for ten (10) years. The bank sponsor shall be responsible for compliance with this Mitigation Banking Instrument and the Bank Development Plan until the Bank is closed in accordance with the Bank closure procedures or until all Credits are sold, whichever is later. The Bank area shall consist of a mixture of _____ as described in Exhibit C.

E. Baseline Conditions: Whereas, the initial phases of the Bank area is currently dominated by _____. These features will be modified so as to re/establish wetland hydrology in this site.

Provide a baseline description of the Property in this section, including acreage and cover type descriptions. Indicate whether the Property has been inspected and the baseline conditions verified.

F. Establishment and Use of Credits: Whereas, in accordance with the provisions of this Banking Instrument and upon satisfaction of the Success Criteria contained herein, Mitigation Credits determined in accordance with Exhibit D of this Banking Instrument will be available to be used as Mitigation in accordance with all applicable requirements for permits issued under Section 401 and 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act and Section 62.1-44.15:5 of the Code of Virginia. The final number of Credits will be determined based upon the final approved design and the resulting habitats planned for each phase of the Bank in accordance with the terms and conditions contained herein.

G. Whereas, as of the date of the Agreement and subject to execution of the Agreement by a duly authorized representative of the respective agencies described below, the Mitigation Banking Review Team (MBRT) consists of:

1. Corps, Chair, represented by _____; and
2. EPA, represented by _____; and
3. FWS, represented by _____; and
4. DEQ, represented by _____; and
5. Virginia Department of Game and Inland Fisheries ("VDGIF"), represented by _____; and
6. VMRC represented by _____; and
7. Virginia Institute of Marine Sciences ("VIMS") represented by _____; and
8. The City/County of _____, represented by _____.

Each entity represented on the MBRT may replace its representative upon written notice to the MBRT chair, the other MBRT members, and the Sponsor.

H. Disclaimer: Whereas, this Banking Instrument does not in any manner affect statutory authorities and responsibilities of the signatory parties.

I. Exhibits: Whereas, the following Exhibits are incorporated by reference to this Banking Instrument:

1. "Exhibit A," Vicinity Map
2. "Exhibit B," Initial Phase Plan;
3. "Exhibit C," Bank Development Plan;
4. "Exhibit D," Crediting and Debiting Procedure for the Bank;
5. "Exhibit E," Service Area Map;
6. "Exhibit F," Restrictive Covenant; and
7. "Exhibit G," Financial Assurance - Escrow Agreement.

Add any appropriate documents regarding title.

NOW, THEREFORE, the parties hereto agree as to the following:

II. DEFINITIONS*

1. BANK SPONSOR – Any public or private entity responsible for establishing, and in most circumstances operating a Mitigation Bank.
2. BANK DEVELOPMENT PLAN – The overall plan governing establishment, Restoration, Creation, Enhancement, and/or Preservation of aquatic resources and associated upland buffers on the Bank Site.
3. COMPENSATION – Actions taken which have the effect of substituting some form of aquatic resource for those lost or significantly disturbed due to a permitted development activity; generally habitat Preservation, Restoration, or Creation.
4. CREATION – The establishment of an aquatic resource, such as a wetland where one did not formerly exist.
5. CREDIT – A unit of measure representing an accrual or attainment of aquatic Functions at a Mitigation Bank.
6. DEBIT – A unit of measure representing the reduction of credits at the Mitigation Bank corresponding to the impact at the project site.
7. ENHANCEMENT – Activities conducted in existing wetlands or other aquatic resources, which increase one or more aquatic Functions.
8. FINANCIAL ASSURANCES – A mechanism or instrument used to guarantee some aspect of the Bank. Financial Assurances may include an escrow account or other mechanism acceptable to the MBRT. There may be 3 different Financial Assurances associated with a Mitigation Bank: a) A mechanism to guarantee an advance release of Mitigation Bank Credits; b) The Maintenance and Monitoring Funds; The Catastrophic Event and Long-Term Management Funds (see Section IV D 3 below).

9. FUNCTIONS – The physical, chemical, and biological ecosystem processes of an aquatic resource without regard to their importance to society.
10. LEDGER – An accounting of Credits and Debits.
11. LONG-TERM STEWARD – The landowner or easement holder of the Bank lands charged with long-term maintenance and management responsibility. A Long-Term Steward may be designated once Success Criteria monitoring (typically monitoring for 10 years following completion of grading) has been completed. In some cases, the Sponsor may also be the Long-Term Steward.
12. MITIGATION – Sequentially avoiding impacts, minimizing impacts, and compensating for remaining impacts to aquatic resources.
13. MITIGATION BANK – A site or sites where wetlands and/or other aquatic resources are restored, created, enhance, or in exceptional circumstances, preserved expressly for the purpose of providing compensatory Mitigation in advance of authorized impacts to similar resources.
14. MITIGATION BANK REVIEW TEAM (or MBRT) – An interagency group of federal, state, tribal, and/or local regulatory and resource agency representatives which are signatory to a Banking instrument and oversee the establishment, use, and operation of a Mitigation Bank with the Corps serving as chair. For tidal wetland Mitigation Banks, the Corps and VMRC will serve as co-chairs.
16. MITIGATION SITE PLAN – A detailed portion of the Bank Development Plan that identifies specifically how aquatic resources and associated upland buffers will be restored, created, enhances, or preserved on the Mitigation Bank.
17. PRESERVATION – The protection of ecologically important aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands or other aquatic resources as necessary to ensure protection and/or Enhancement of the aquatic ecosystem.
18. RESTORATION – Re-establishment of wetlands or other aquatic resource characteristics and Function(s) at a site where they have ceased to exist, or exist in a substantially degraded state.
19. SUCCESS CRITERIA – The minimum standards required to meet the objectives for which the Bank was established.

* Derived from:

Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks (FR V. 60 No. 228, November 28, 1995);

Guidelines for Establishment, Use, and Operation of Tidal Wetland Mitigation Banks in Virginia (4 VA Admin. Code 20-391-10 et. seq.);

Cowardin, L.M. et al. 1979. Classification of Wetlands and Deepwater Habitats of the United States. U. S. Fish and Wildlife Service, Office of Biological Services. Washington, D.C. FWS/OBS-79/31. 131 pp._

III. AUTHORITIES

The establishment, use, operation and maintenance of the Bank is carried out in accordance with the following authorities:

A. Federal:

1. Clean Water Act (33 USC 1251 et seq.);
2. Rivers and Harbors Act (33 USC 403);
3. Fish and Wildlife Coordination Act (16 USC 661 et seq.);
4. Regulatory Programs of the Corps of Engineers, Final Rule (33 CFR Parts 320-330);
5. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR Part 230);
6. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under Clean Water Act, Section 404 (b)(1) Guidelines (February 6, 1990);
7. Federal Guidance for the Establishment, Use, Operation of Mitigation Banks (60 F.R. 58605 et seq. November 28, 1995); and
8. Regulatory Guidance Letter No. 02-02, U.S. Army Corps of Engineers, December 26, 2002

B. Commonwealth of Virginia:

1. Sections 28.2 - 1308, 33.1 - 223.2:1, and 62.1 - 44.15:5 of the Code of Virginia.
2. Virginia Water Protection Permit Regulation (9 VAC 25-210); and
3. Guidelines for the Establishment, Use, and Operation of Tidal Wetland Mitigation Banks in Virginia (4 VAC 20-391-10 et seq.)

IV. ESTABLISHMENT OF THE BANK

A. Scope of Work: The Sponsor agrees to perform all necessary work, in accordance with the provisions of this Banking Instrument, to establish and maintain aquatic habitats and uplands buffers, as described in Exhibit C, until it is demonstrated to the satisfaction of the agencies represented on the MBRT (acting through the Chair) that the project complies with all provisions contained herein, or until all Credits are sold, whichever is later. Work as described above shall include implementing the Bank Development Plan (Exhibit C). Prior to any Debiting, the Mitigation Site Plan for the phase of the Mitigation Bank proposed for Debiting must be approved by the MBRT, the site for that phase must be secured, and appropriate Financial Assurances (escrow agreement) for that phase must be established.

B. Permits: The Sponsor will obtain all appropriate permits or other authorizations needed to construct and maintain the Bank, prior to Debiting any advance Credits. This Banking Instrument does not fulfill or substitute for such authorization.

The Sponsor agrees not to utilize a non-reporting Nationwide Permit or State Program General Permit under Section 404 of the Clean Water Act or state general permits under VWPP regulations to impact any Waters of the United States and/or State Waters on the Property. Notification shall be required for the use of any Nationwide Permit, State Program General Permit, Regional Permit, or state general permit under VWPP regulations.

C. Bank Development Plan: *The Bank Development Plan must be approved by the MBRT. If the Bank will be developed in phases, the phases should be described in the Bank Development Plan.*

Establishment of the Bank may be performed in phases as described in the Bank Development Plan (Exhibit C), and the Credits will become available in accordance with the schedule specified in Part IV, Sections D through G of this Banking Instrument.

D. Financial Assurance Requirements: *The Sponsor will use an escrow account to satisfy Financial Assurance requirements; the appropriate Financial Assurance documents should be attached as exhibits.*

1. The Sponsor agrees to provide the following Financial Assurances sufficient to cover the advance release of Credits (not to exceed 15% of the total planned Credits) for the work described in this Banking Instrument and the Bank Development Plan:

a. The Sponsor shall establish an escrow account with the following law firm or title company who will act as an escrow agent for this Banking Instrument:

The Sponsor may, at its discretion, replace this escrow agent with a different law firm or title company registered to do business in the Commonwealth of Virginia.

b. For the advance release of Credits (not to exceed 15% of the total number of Credits that could be derived from this site) the Sponsor agrees to provide adequate Financial Assurances (escrow agreement) to ensure that wetland acreage would be restored on site (or the corresponding amount of wetland Credits purchased at an approved Bank) in the event of a default (see also Part V, F1). Release of funds from this Financial Assurance will be recommended by the MBRT upon receipt of a Corps-confirmed jurisdictional delineation that demonstrates that the Sponsor has successfully restored, created, or enhanced as appropriate, sufficient acreage to offset the advance release of Credits.

2. For any sale of Mitigation Credits consummated by the Sponsor:

a. 8% of all cash proceeds from said transactions shall be placed in a separate escrow account to be called the Maintenance and Monitoring Fund. If the required monitoring or maintenance is not conducted as specified in Section VI of this instrument and the Bank Development Plan, then the MBRT, acting through the Chair shall request release of funds to an MBRT agency or its designee from this account sufficient to cover the necessary monitoring or maintenance activities. One-tenth of this fund (or 0.8% of the total cash proceeds) shall be released to the Sponsor on each February 1st after the MBRT reviews and approves the most recently submitted monitoring report (see Section VI C) that documents that part or all of the Restoration/Creation portion of the site satisfies the Bank Success Criteria (see Part V E) to cover the expected costs of Mitigation and monitoring over the required 10 year monitoring period. The last one-tenth of the fund (or 0.8% of the total cash proceeds) shall be held until the final monitoring report is submitted.

(The MBRT should be flexible regarding the percentage of cash proceeds placed in an escrow account. A higher percentage may be required for high-risk Mitigation Bank sites & lower percentages for those with a greater likelihood of success.)

b. 2% of all cash proceeds from said transactions shall be placed within a separate escrow account to be called the Catastrophic Event and Long-Term Management Fund. These funds shall be placed in a federally insured financial institution in an interest bearing account. In the event of a catastrophic event, as determined by the MBRT, that effects the long term viability of the Mitigation Bank, the MBRT can cause the appropriate corrections to occur by either: (i) directing the Sponsor, if said event occurs while the Sponsor's maintenance period is in effect, to implement corrections which will be funded by a release of said funds, (ii) recommend the escrow agent release the necessary funds to the Long-Term Steward of the Mitigation Bank to make necessary corrections and/or manage the Property, or (iii)) recommend the escrow agent release the funds to an Agency represented on the MBRT or its designee to effect the necessary corrections. Any unspent funds shall remain in this fund if not utilized to repair the Mitigation Bank from a catastrophic event or for long-term management of the Bank site. This Catastrophic Event and Long-Term Management Fund will be transferred to the designated Long-Term Steward of the land for use in addressing future catastrophic events or land management requirements once all monitoring has been completed and all Credits from the Bank have been Debited.

(The percentage of cash proceeds placed in the Catastrophic Event & Long-Term Management Fund may be less than or greater than 2%, depending upon foreseeable long-term management requirements. For instance, sites that rely upon water control structures may require more long-term management than those without those structures. The percentage should be sufficient to remediate catastrophic events and to enable the Long-Term Steward to manage the Bank site, including fencing, structures, invasive species control, etc. It should be noted that most MBRT members do not support the use of water control structures that may require long-term or ongoing maintenance to sustain wetland hydrology.)

4. Long-term (past 10 years) maintenance requirements will be determined on a site-specific basis. However, any such activities shall be the responsibility of the Long-Term Steward. The Catastrophic Event and Long-Term Management Fund, shall provide a funding source for any significant repairs necessitated by natural disasters or other catastrophic events as defined in paragraph E below that the Sponsor or Long-Term Steward must address.

E. Catastrophic Event and Long Term Management Fund: As described above, a portion of all cash proceeds from said transactions shall be placed in an escrow account called the Catastrophic Event and Long Term Management Fund. Damages from the catastrophic events identified below are permitted to be repaired using the principal and interest accumulated in the Catastrophic Event and Long Term Management Fund by either the Sponsor or the long term steward of the land, the funds being provided to whichever entity has title to the Property at the time of catastrophic event and responsibility to repair the resulting damages. Expenditures shall be approved by the MBRT if the

damage occurs within the 10-year monitoring period associated with Bank establishment. If the damage occurs after that 10-year establishment period, the Long-Term Steward of the land shall approve expenditures to address the following issues:

1. Drought, insect damage, animal damage, or infection damages to planted vegetation that occurs at a magnitude such that the vegetation fails to achieve the Success Criteria described in Section V.E and after each respective phase of planting has surpassed the contractor's one-year warranty (if a one-year warranty was required).
2. Erosion and/or sediment damages occurring after the site has been fully stabilized and applicable erosion and sediment control bonds required by _____ County have been released by _____ that county.
3. Breach of any berms, embankments or spillway and/or damage to outlet structures from a storm event.
4. Damage resulting from fire, flood, hurricane, and other natural disasters;
5. Any long-term maintenance requirements necessitated under paragraph IV D (4) above.

F. Real Estate Provisions: The Sponsor shall record a restrictive covenant on the Bank land and provide a copy to the MBRT prior to sale of any Credits in favor of any permittee. A template restrictive covenant is attached as in Exhibit F. A copy of the recorded document shall be provided to the Corps within 30 days of recordation.

G. An as-built report may be required depending upon the specifics of the Bank. An as-built survey may not be required for Restoration based upon plugging of ditches. The Sponsor agrees to submit an as-built report to the Chair of the MBRT for each phase of the Bank within 60 days following completion of the grading for that phase of the Bank. The as-built report will describe in detail any substantial deviation from the requirements described in the Mitigation plan submitted to the MBRT Chair in accordance with the Bank Development plan (Exhibit C), and the as-built report shall contain a survey showing finished grades.

V. OPERATION OF THE BANK

A. Service Area: The Bank is established to provide Mitigation to compensate for impacts to Waters of the United States and/or State Waters, including wetlands, within the service area depicted on the excerpt of the USGS Hydrologic Unit Map as shown in Exhibit E. This service area shall include Hydrologic Unit _____, and the portion of _____ within _____, _____ and _____ Counties and _____, _____ Cities.

B. Access: The Sponsor will allow, or otherwise provide for, access to the site by members of the MBRT or their agents or designees, as reasonably necessary, for the purpose of inspection, compliance monitoring, and remediation consistent with the terms and conditions of this Banking Instrument throughout the period of Bank establishment, monitoring, and operation. Inspecting parties shall not unreasonably disrupt or disturb activities on the Property.

C. Projects Eligible to Use the Bank: The following types of projects may be eligible to use the Wetland Bank:

1. All activities regulated under Section 10 of the Rivers and Harbors Act, Section 404 of the Clean Water Act and/or the Virginia Water Protection Permit Regulations (9 VAC 25-210) located within the Service Area of this Mitigation Bank may be eligible to use Mitigation Bank as compensatory Mitigation for unavoidable impacts;
2. Use of Credits may only be authorized when adverse impacts are unavoidable; when onsite Compensation is either not practicable or use of a Mitigation Bank is environmentally preferable to onsite Compensation.
3. Credits may be used to compensate for environmental impacts under other programs (civil works, Superfund removal and remedial, supplemental environmental projects for state and Federal enforcement actions, etc.)
4. For projects in the service area of this Mitigation Bank that require authorization with a Nationwide Permit (NWP) under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act, Norfolk District State Program General Permit (SPGP), and/or a Virginia Water Protection Permit, and if said authorizations requires compensatory Mitigation, Credits from this Mitigation Bank may be permitted to be used to satisfy these compensatory Mitigation requirements if the Sponsor and the third party permittee reach a mutually acceptable Financial agreement and subject to regulatory approval on a case by case basis.
5. For projects in the Service Area of this Mitigation Bank that require authorization with an Individual Permit (IP) under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act and/or Virginia Water Protection Permit, the Corps and DEQ, in consultation with the other regulatory and resource agencies, will determine the eligibility of such projects to use the Bank on a case-by-case basis. Once the Corps and/or DEQ have determined that Mitigation in this Bank is ecologically preferable to any on-site alternatives or that there are no practicable on-site alternatives, Mitigation may be provided by the use of Mitigation Credits from the Mitigation Bank as determined by the Corps and/or DEQ for each agency's respective permits if the Sponsor and the third party permittee reach a mutually acceptable Financial agreement.

D. Assessment Methodology: Credits and Debits will be assessed using measurements of the area of impacts and the Mitigation land area. The number of Credits created by development of this Mitigation Bank is determined by a combination of land area and habitat type provided in the Bank Development Plan (Exhibit C) as described in Exhibit D. The amount to be Debited for each impact will depend upon the area of wetlands or waters to be impacted as determined during the permitting process.

E. Success Criteria: The following criteria will be used to assess project success:

1. In upland buffer areas, at least _____ living woody stems per acre of trees and shrubs must be achieved by the end of the third growing season and maintained through the end of the monitoring period (*if applicable*).
2. In vegetated wetland areas:
 - (a) Wetland hydrology, defined as saturation of the major part of the root zone (in the upper 12 inches of the soil profile) or ponding upon the soil surface for at least twelve and one-half percent (12.5%) of the growing season must be achieved (for the purpose of this determination, the growing season is defined as the period in which temperatures are expected to be above 28°F in 5 out of 10 years. This is the period between _____ and _____ in _____ County/City; or the period during which the soil temperature in a wetlands in _____ County/City is greater than biological zero (5°C) at a depth of 50 cm (19.6 inches) if such data is available), and
 - (b) Wetland vegetation dominance, defined as a vegetation community where more than 50% of all dominant species are facultative ("FAC") or wetter, excluding FAC-plants, using "routine delineation methods" as described in the "Corps of Engineers Wetland Delineation Method," Technical Report 87-1 ("1987 Manual"), must be achieved; and
 - (c) Plant density in forested and shrub/scrub wetland areas of at least _____ living woody stems per acre of trees and shrubs must be achieved by the end of the first growing season following planting and maintained through the end of the monitoring period until canopy coverage is greater than 30% and no more than 5% aerial cover of invasive species such as *Typha latifolia* or *Phragmites australis*; and
 - (d) Plant coverage in emergent wetland areas of at least ____% must be achieved by the end of the first growing season, ____% must be achieved by the end of the second growing season, and ____% must be achieved by the end of the third growing season and maintained through the end of the monitoring period with no more than ____% aerial cover of invasive species such as *Typha latifolia* or *Phragmites australis*; and
 - (e) Plant density in forested wetlands areas must include at least ____ living stems per acre of _____ (sp.) that are rated FAC or wetter, excluding FAC- species; and
 - (f) Plant coverage in floating aquatic areas of at least ____% must be achieved during a portion (July and August) of the first growing season, ____% must be achieved during a portion of the second growing season, and ____% must be achieved during a portion of the third growing season and maintained during a portion of each subsequent growing season (i.e., these plants do not persist in colder periods of the growing season, thus this requirement only pertains to the middle portion of the growing season).
 - (g) *Soil Success Criteria shall be evaluated for wetland Creation areas located on non-*

hydric soils. In that event, the following success criteria shall be followed:

- (1) For coarse textured (sandy) surface soils, positive indicators of hydric soil formation must be demonstrated within 6 inches of the soil surface. Groundwater monitoring may be used as the positive indicator for the first 2 years after reaching the final grade, in which case, wells must demonstrate free water within 6 inches of the surface for 15 consecutive days during the growing season.
- (2) For fine textured soils (silts, clays, loams), positive indicators of hydric soil formation must be demonstrated within 12 inches of the soil surface. Groundwater monitoring may be used as the positive indicator for the first 2 years after reaching the final grade, in which case, wells must demonstrate free water within 12 inches of the surface for 15 consecutive days during the growing season.
- (3) Positive indicators of hydric soil formation may include redoximorphic features including, but not limited to redox concentrations, redox depletions, reduced matrices, positive tests with α, α , diperydyl, or other field indicators contained in the Field Indicators of Hydric Soils of the U.S.
- (4) A complete soil morphologic description shall be documented pre and post construction and at the 3rd year following construction and each subsequent mandatory monitoring year to document changes in overall soil morphology, particularly the development of redoximorphic features over time (such as a reduction in matrix chroma or development of redox depletions), to demonstrate that soils at the site are progressing towards hydric soil conditions. At a minimum, soil profiles shall be described within 30 feet of each well.

3. Stream Success Criteria (under development)

4. Submittal of required documentation, including monitoring reports, semi-annual Ledgers, as-built drawings, proof of escrow deposits and withdrawals in accordance with Section VI. C. (Maintenance and Monitoring).

F. Schedule of Credit Availability: Upon submittal of all appropriate documentation by the Sponsor, and subsequent approval by the MBRT, the MBRT Chair will provide in writing the release of Credits for use by the Sponsor or for transfer to a third party in accordance with the following schedule:

1. Up to fifteen percent (15%) of total anticipated Credits will be available for Debiting upon implementation of the following: (a) approval of this Banking Instrument and the Mitigation Site Plan described in Exhibit C; (b) execution of an Escrow Agreement substantially in accordance with the sample Escrow Agreement provided in Exhibit G; (c) acquisition of the Property proposed for the Mitigation Bank; (d) a copy of the approved and recorded real estate instrument that protects the site in perpetuity is provided to the

MBRT; (e) and a schedule is submitted to the MBRT that shows that the initial (i.e., Phase I) physical and biological improvements will be completed no later than the first full growing season following initial Debiting from the Bank;

2. Credits beyond 15% advanced could be released by the MBRT, (acting through the Chair) once all three (3) wetlands criteria are met, with subsequent monitoring (see VI B. below) to demonstrate continued satisfaction of the Success Criteria in V E. above.

G. Conditions on Debiting: Any Credits Debited before achieving the Success Criteria (e.g. the 15% advance release of Credits), shall require conformance with the Financial Assurance requirements described in Section IV.D, and execution of an Escrow Agreement in substantial conformance with the agreement found in Exhibit G to provide sufficient Financial Assurance to assure performance and to cover contingency actions in the event of partial or total failure. Aside from the advance release of credits, if the number of Credits Debited exceeds the number created, then no further credit sales shall be permitted by the MBRT until the Sponsor has implemented corrective actions and achieved the Success Criteria so as to provide for the number of Credits to be greater than or equal to the number of Credits Debited to cover permitted impacts with this Mitigation Bank.

H. Provisions For Uses of the Mitigation Bank Area: The Sponsor shall not use or authorize the use of areas within the Bank for any purpose that interferes with its conservation purposes other than those specified below:

- a) Monitoring of vegetation, soils and water;
- b) Maintenance of wetlands, trails, bridges, berms, dams, outlet and spillway structures, and other appurtenant facilities;
- c) Hunting and fishing and other recreational uses such as hiking and bird watching;
- d) Ecological education; and
- e) Compliance with federal regulations or appropriate court orders.

VI. MAINTENANCE AND MONITORING OF THE BANK

A. Maintenance Provisions: The Sponsor agrees to perform all necessary work to maintain the Bank consistent with the maintenance criteria established in the Bank Development Plan. The Sponsor shall continue with such maintenance activities until completion of the monitoring period described in Section VI.B. Deviation from the approved Bank Development Plan is subject to review and written approval by MBRT, acting through the Chair.

B. Monitoring Provisions: The Sponsor agrees to perform all necessary work to monitor the Bank to demonstrate compliance with the Success Criteria established in this Banking Instrument.

The monitoring program shall follow the guidelines established below:

1. Visual Description. Visual descriptions shall be provided with each monitoring report by one of the following means: (i) ground level photographs, taken facing north, south, east and west, from stations located adjacent to each vegetation plot and hydrology monitoring station [permanent markers shall be established to ensure that the same locations (and view

directions) are monitored in each monitoring period], or (ii) one color aerial photograph (8" x 10" or larger) depicting the entire site. An aerial photograph should be taken once the site has been graded, planted, and stabilized (preferably in the 3rd or 5th year following final grading).

2. Hydrology. This is a _____ driven system on top of a _____ substrate. For surface saturation driven systems located on top of a clayey substrate, soil saturation measurement devices may be used in lieu of groundwater wells and other secondary hydrology indicators to determine groundwater elevations and/or hydro period in these wetlands areas. Specific details on the soil saturation measurement device and location or groundwater monitoring wells shall be provided in the Final Construction Documents for MBRT approval as described in Exhibit C. For each monitoring report, either 60 days of continuous automated monitoring, or 8 consecutive weekly measurements shall be provided during the growing season to demonstrate achievement of the hydrology performance criterion (actual monitoring may be of longer duration, as needed, to obtain proof of wetland hydrology).
3. Vegetation. Sample plots shall be located on a stratified random basis over the site in order to sample all habitat areas of constructed wetlands at locations adjacent to each photo location marker. The following numbers of samples will be required:

If the site is < 5 acres, then a minimum of 3 plots/acre is necessary

If the site is > 5 acres but less than 20 acres, then a minimum of 2 plots/acre is necessary.

If the site is > 20 acres, then a minimum of 1 plot/acre is necessary

Each plot shall be of a size no less than 20'x20' for woody plants and 3'x3' for herbaceous plants (or circular with approximately the same surface area). Alternative sampling methods may be submitted for MBRT review and approval. The vegetation data shall be collected in the _____ time period and shall include:

- (a) Dominant vegetation species identification;
 - (b) Coverage assessment;
 - (c) Number of woody plant stems (total and #/acre);
 - (d) The percentage of dominant species FAC or wetter (excluding FAC-).
 - (e) Percent survival of planted species; and
 - (f) An invasive/noxious species assessment;
 - (g) Number and species of _____ (sp.) rated FAC or wetter (excluding FAC-) growing in wetlands (total and #/acre).
4. Timing. Monitoring activities shall occur during the growing season, and at least:
 - (a) Once during the 1st, 2nd, 3rd, 5th, 7th and 10th growing seasons following completion of grading;
 - (b) Monitoring of woody vegetation for the first year or any year following planting shall take place between September and November;
 - (c) If all performance criteria have not been met in the 10th year, then a monitoring report shall be required for each consecutive year until two annual

sequential reports indicate that all criteria have been successfully satisfied (i.e., that corrective actions were successful).

- (d) A final monitoring report (typically prepared the 10th growing season following completion of grading)

Monitoring may be terminated at the discretion of the MBRT.

C. Reports: The Sponsor shall submit to the MBRT reports describing the conditions of the Bank and relating those conditions to the Success Criteria. Reports will be submitted by November 30th of each monitoring year and shall contain the following:

1. An aerial photograph, taken either the 3rd or 5th year following final grading (if allowed in accordance with national security provisions) during the growing season, depicting the completed phases of the Mitigation Bank with the photo date and approximate scale noted, and ground level photographs as described in Section VI.B;
2. A detailed narrative summarizing the condition of the Bank and all regular maintenance activities;
3. A drawing based upon the grading plans of the site that depicts topography, and the location of wells, sampling plots and permanent photo stations;
4. Results of hydrology measurements, including depth of standing water and daily precipitation data for the monitoring period from _____ to _____ with a comparison to historical average precipitation;
5. Results of vegetation survey including visual estimates of percentage (%) overall cover and % cover by each vegetation layer, species diversity, % exotic vegetation in each vegetation layer, total % “facultative” and total % “upland” species in each vegetation layer, survival rate of planted vegetation, an estimate of natural revegetation, and a qualitative estimate of plant vigor as measured by evidence of reproduction; and
6. A summary of Credits created by the Bank and the permits that have been Debited against these Credits.

D. Accounting Procedure: The Sponsor shall submit a statement to the Corps and DEQ each time Credits are Debited or additional Credits are approved. If requested, the Corps will distribute the statement to other members of the MBRT. In addition, the Sponsor shall submit a semi annual Ledger to the Corps for distribution to all members of the MBRT, showing all transactions at the Bank for the previous reporting period and a cumulative tabulation of all transactions to date. At a minimum, each Ledger must include the following information: permittee, Permit number, type of permit, locality, type of impacted system (Cowardin Classification), amount of impacts, amount of Debit from Mitigation Bank, USGS HUC Catalog Unit, Date of transaction). The MBRT will review the semi annual report and adjust the credit composition to assure no net loss of wetlands acreage. Semi-annual Ledgers and transaction reports shall be submitted to the MBRT as long as Credits remain in the Bank and the Bank remains operational.

E. Contingency Plans/Remedial Actions: In the event the Bank or a specific phase of the Bank fails to achieve the Success Criteria specified in Part V, Section E of this Banking Instrument, the Sponsor shall develop necessary contingency plans and implement appropriate remedial actions for the Bank or that phase in coordination with the MBRT. In the event the Sponsor fails to implement necessary remedial actions within one growing season (November 1 of the following year) after notification by the Corps and/or DEQ of necessary remedial action to address any failure in meeting the Success Criteria, the MBRT (acting through the Chair) will notify the Sponsor and the appropriate authorizing agency(ies) and recommend appropriate remedial actions including suspension/revocation of available Mitigation Credits (see VIII M. below).

If the authorizing agency(ies) determines that the Bank is operating at a deficit, Debiting by the Sponsor of Credits shall immediately cease, and the authorizing agency(ies), in consultation with the MBRT and the Sponsor, will determine what remedial actions are necessary to correct the situation. As determined by the Chair in coordination with the MBRT and the Sponsor, if conditions at the Bank site do not improve or continue to deteriorate within one growing season from the date that the need for remediation was first identified in writing to the Sponsor by the Chair of the MBRT, the MBRT, (acting through the Chair) shall request the escrow agent to transfer the amount necessary to correct the deficiency from the Monitoring and Maintenance Funds to a party acceptable to the MBRT, to undertake corrective measures. The MBRT may also choose to suspend credit transactions until the deficiency(ies) is (are) corrected (see VIII M. below).

At the written request of the Sponsor, the MBRT will perform a compliance visit to determine whether all Success Criteria have been satisfied.

F. Default: Should the MBRT determine that the Sponsor is in material default of any provision of this Agreement, the MBRT, acting through the Corps may notify the Sponsor that the sale or transfer of any Credits will be suspended until the appropriate deficiencies have been remedied. Upon notice of such suspension, the Sponsor agrees to immediately cease all sales or transfers of Mitigation Credits until the MBRT informs the Sponsor that sales or transfers may be resumed. Should the Sponsor remain in default, the MBRT, acting through the Corps, may terminate the Mitigation Banking Instrument and any subsequent Bank operations. Upon termination, the Sponsor agrees to perform and fulfill all obligations under this Agreement relating to Credits that were sold or transferred prior to termination.

G. Bank Closure: At the end of the 10-year monitoring period, upon satisfaction of the Success Criteria, the MBRT shall issue a written certification of satisfaction to the Sponsor and the escrow agent, and thereafter any remaining Monitoring and Maintenance Fund (see Section IV D (3)(a)) will be released to the Sponsor. The Sponsor may be allowed to utilize that portion of the Bank lands that have not had Compensation Credits Debited from it (i.e. Restoration, Creation, Enhancement, or Preservation lands) provided the utilization does not adversely impact the areas from which Compensation credit has been Debited. With Bank closure, the Catastrophic and Long-Term Management Fund shall be conveyed to the Long-Term Steward of the Bank lands.

H. Long-Term Ownership and Preservation: [*Specify the responsible entity and source of funds for long-term management.* At the end of the active monitoring period, the Sponsor shall

transfer the entire Catastrophic Event and Long-Term Management Fund (see section IV E above) and the title to the Bank land to _____, the designated Long-Term Steward of the Bank land [*Identify the Long-Term Steward*]. At that time, the _____ [*Long-Term Steward*] shall be responsible for managing the Bank in perpetuity in accordance with the terms of a long-term management plan (if one has been developed) and real estate provisions, including the terms of the recorded restrictive covenant, a sample of which is provided in Exhibit F. If _____ [*Long-Term Steward*], or their heirs decline to accept title of the Bank and the associated Long-Term Management Fund, the Sponsor shall then transfer title of the Bank and the associated Long-Term Management Fund to a public resource agency or non-profit agency engaged in conservation activities, subject to written approval of the receiving entity by the MBRT. If no public resource agency or non profit agency engaged in conservation activities is willing to accept title to and responsibility for the Bank lands, then the Sponsor will be the Long-Term Steward until another party acceptable to the MBRT agrees to accept title to and management responsibility for the Bank lands.

VII. RESPONSIBILITIES OF THE MITIGATION BANK REVIEW TEAM

A. The agencies represented on the MBRT agree to provide appropriate oversight in carrying out provisions of this Banking Instrument.

B. The agencies represented on the MBRT agree to review and provide comments on all project plans, proposed additions of land to the Bank, annual monitoring reports, credit review reports, contingency plans, and necessary permits for the Bank. Comments, if any, on the final construction documents for each phase as described in Exhibit C, additions of land to the Bank, monitoring reports, credit review reports, contingency plans, and permits for Mitigation Bank construction and operation will be reviewed within ninety (90) calendar days from the date of complete submittal. The Chair of the MBRT shall coordinate such review with members of the MBRT so that comments can be provided within the ninety (90) calendar day comment period.

C. The agencies represented on the MBRT agree to review and confirm reports on evaluation of Success Criteria prior to approving Credits within each phase of the Bank.

D. The agencies represented on the MBRT shall conduct compliance inspections, as necessary to verify Credits available in the Mitigation Bank, and recommend corrective measures (if any) to the Bank Sponsor, until the terms and conditions of the Bank Development Plan have been determined to be fully satisfied or until all Credits have been sold, whichever is later.

VIII. OTHER PROVISIONS

A. Force Majeure: The Sponsor will not be responsible for Bank failure that is attributed to natural catastrophes such as flood, drought, disease, regional pest infestation, etc., that the MBRT, acting through the Chair, determine is beyond the reasonable control of the Sponsor to prevent or mitigate. The Sponsor is required to take corrective actions associated with catastrophic events and to use the Catastrophic Event Fund, described in Section IV.D, to fund corrective measures required to repair the Mitigation Bank from such events.

B. Dispute Resolution: Resolution of disputes about application of this Banking Instrument shall be in accordance with those stated in the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 F.R. 58605 et seq., November 28, 1995). Disputes related to satisfaction of Success Criteria may be subject to independent review from government agencies or academia that are not part of the MBRT. The MBRT will evaluate this input and determine whether the success criteria are met.

C. Validity, Modification, and Termination of the Banking Instrument: This Banking Instrument will become valid on the latter date of either the Sponsor's signature or the signature of the representative of the Corps. This Banking Instrument may only be amended or modified with the written approval of all signatory parties. Any of the MBRT members may terminate their participation upon written notification to all signatory parties without invalidating this Banking Instrument. Participation of the MBRT member seeking termination will end 30 days after written notification.

D. Specific Language of Banking Instrument Shall Be Controlling: To the extent that specific language in this document changes, modifies, or deletes terms and conditions contained in those documents that are incorporated into the Banking Instrument by reference, and that are not legally binding, the specific language within the Banking Instrument and any associated Bank Development Plans shall be controlling.

E. Notice: Any notice required or permitted hereunder shall be deemed to have been given either (i) when delivered by hand, or (ii) three (3) days following the date deposited in the United States mail, postage prepaid, by registered or certified mail, return receipt requested, or (iii) sent by Federal Express or similar next day nationwide delivery system, addressed as follows (or addressed in such other manner as the party being notified shall have requested by written notice to the other party):

Insert addresses of the Sponsor and MBRT members here.

F. Entire Agreement: This Agreement constitutes the entire agreement between the parties concerning the subject matter hereof and supersedes all prior agreements or undertakings.

G. Modification: This Agreement may not be modified except by the written agreement of the signatory parties. In the event the Sponsor determines that modifications must be made in the Bank Development Plan to ensure successful establishment of habitat within the Bank, the Sponsor shall submit a written request for such modification to the MBRT, through the Chair, for approval. The MBRT, through the Chair, agrees to not unreasonably withhold or delay such approval. Documentation of implemented modifications shall be made consistent with this agreement.

H. Invalid Provisions: In the event any one or more of the provisions contained in this Agreement are held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability will not affect any other provisions hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had not been contained herein.

I. Headings and Captions: Any paragraph heading or captions contained in this Agreement shall be for convenience of reference only and shall not affect the construction or interpretation of any provisions of this Agreement.

J. Counterparts: This Agreement may be executed by the parties in any combination, in one or more counterparts, all of which together shall constitute but one and the same instrument.

K. Binding: This Agreement shall be immediately, automatically, and irrevocably binding upon the Sponsor and its heirs, successors, assigns and legal representatives upon execution by the Sponsor and the Corps, even though it may not, at that time or in the future, be executed by the other potential parties to this Agreement. The execution of this Agreement by EPA, DEQ, or the USFWS, or other agency, city or county shall cause the executing agency to become a party to this Agreement upon execution, even though all or any of the other potential parties have not signed the Agreement. Execution does not signify the agencies' agreement with the use of Credits in the _____ Wetland Mitigation Bank in connection with any specific permit or project.

L. Liability of Regulatory Agencies: The responsibility for Financial success and risk to the investment initiated by the Bank Sponsor rests solely with the Bank Sponsor. The regulatory agencies that are parties to this agreement administer their regulatory programs to best protect and serve the public's interest in its waterways, and not to guarantee the financial success of Banks, specific individuals, or entities. Accordingly, there is no guarantee of profitability for any individual Mitigation Bank. Bank Sponsors should not construe this agreement as a guarantee in any way that the Agencies will ensure sale of Credits from this Bank or that the Agencies will forgo other Mitigation options that may also serve the public interest. Since the Agencies do not control the number of Mitigation Banks proposed or the resulting market impacts upon success or failure of individual Banks, in depth market studies of the potential and future demand for Bank Credits are the sole responsibility of the Bank proponent.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date herein below last written.

Date

MITIGATION BANK REVIEW TEAM

By the MBRT Chair:

U.S. Army Corps of Engineers, Norfolk District Date

By: _____

Its: _____

By the MBRT Members:

Environmental Protection Agency, Region III Date

By: _____

Its: _____

U.S. Fish and Wildlife Service Date

By: _____

Its: _____

Virginia Department of Environmental Quality Date

By: _____

Its: _____

Virginia Marine Resources Commission Date

By: _____

Its: _____

Exhibit C

Bank Development Plan

I. Phasing

The Bank shall be planned and designed in phases. _____ phases have been identified to date, encompassing _____ acres of land along _____ waterway. Additional parcels in the _____ watershed may be contracted for purchase and proposed for inclusion in the _____ Bank by the Bank Sponsor by submission of a concept plan to the MBRT.

II. Concept Plan of Initial Phase

A. Background

Careful consideration will be given to the ecological suitability of site for achieving goals and objectives. Ecologically significant aquatic or upland resources, cultural sites or habitat for endangered species shall not be compromised in the process of establishing a Bank.

Attached is a Concept Plan for Phase I prepared by _____ dated _____, consisting of the following sheets:

1. Cover Sheet with Location Map and Soils Map;
2. Existing Conditions with wetlands delineation survey, 6" C.I.
topography and soil test pit locations;
3. Concept Grading Plan and Credit Analysis;
4. Soil test pit profiles;
5. Soil test results;

Based upon the hydric soils map, field borings of the soils, and discussions with the owner it appears that the areas proposed for Restoration/Creation were historically _____ areas. They were converted to _____ in order to _____ by a combination of:

1. Ditching,
2. Recontouring, and
3. Filling

B. Proposal

To reverse the previous _____ practices on these lands so as to restore drained and degraded wetlands areas to a high level of wetlands Function. This shall be accomplished by a combination of practices, including but not limited to:

1. Filling or blocking of ditches,

2. Creation of low berms with outlet controls,
3. Regrading of high spots,
4. Removal of fill areas,
5. Herbicide treatments of non-native species, if required,
6. Discing and plowing of soils
7. Replanting of indigenous vegetation, and
8. Fencing along adjacent agricultural uses.

Specific goals and objectives for each portion of the Mitigation Bank shall be specifically provided in the Mitigation Site Plan for each phase of the Bank.

III. Mitigation Site Plan

A. Submission and Approval

The Sponsor shall submit the Mitigation Site Plan to the MBRT for each phase of the Bank and obtain approval of the MBRT (in accordance with Section VI.B. of the Mitigation Banking Instrument), prior to commencement of construction activities.

B. Design Specifications

The Mitigation Site Plan shall include, at a minimum:

- a. Narrative describing the nature of the wetland Mitigation concept.
- b. Grading plans at a scale of 1" = 50' and providing 0.5 ft contour intervals in wetlands Restoration areas (or metric equivalent), or at a more detailed scale. Plans shall use the correct vertical datum, NOS in tidal Mitigation areas and NGVD 88 in non-tidal areas.
- c. Erosion and Sediment Control Plans, in accordance with the _____ County/City Design and Construction Standards Manual and the most current edition of the Virginia Erosion and Sediment Control Handbook
- d. Water budget for a typical, wet, and dry year that includes, on a monthly basis:
 - (1) Inputs
 - (a) Precipitation
 - (b) Infiltration
 - (c) Surface Flow Runoff
 - (2) Outputs
 - (a) Evapotranspiration
 - (b) Exfiltration
 - (c) Spillway Outflow
- e. Vegetation plan depicting or listing expected zonation (i.e., POWZ, PEM, PS/S, and PFO). The habitat design goal will be to maximize the Restoration of _____ aquatic resource areas.

- f. Vegetation schedule with plants and seeds selected based on habitat value and projected water elevation and duration. Said schedule shall include:
- (1) Species;
 - (2) Wetland indicator status as specified in the current version of the *National List of Plant Species That Occur in Wetlands: Northeast (Region 1)*
 - (3) Plant size and spacing; and
 - (4) Wildlife value assessment.

The vegetation shall primarily comprise of a herbaceous wetlands seed mix (at least ten (10) native species commonly found in region) to reflect the expected community type during the initial growth years of tree and shrub seedlings. Bare root tree seedlings and shrubs shall be randomly planted in Restoration areas, and comprised of at least 5 of the following species: _____, _____, _____, _____, _____.

- g. A surveyed wetland delineation, in accordance with the Corps' 1987 Manual, of existing wetlands areas of each phase.
- h. A credit analysis based on the Mitigation Site Plan for the subject phase, utilizing the methodology described in Exhibit D Section II of this Agreement, to estimate the expected number of Credits that will be created by the plan.

C Monitoring

(Detail the specific monitoring activities used to satisfy Success Criteria identified in Section IV E of the Bank Instrument, including methodology for monitoring soil, vegetation, and hydrology criteria such as numbers of monitoring wells, placement of stream gauges, plant sampling strategies, etc.)

D Maintenance Activities

(Include likely maintenance activities such as posting of Property limit, maintenance of fences, water control structures, access roads, plantings, mowing, or the use of approved herbicides)

Exhibit D

Crediting and Debiting Procedure for the Bank

I. Impact Debit Values

The Cowardin system of wetland classification shall be utilized to determine the maximum number of Credits that may be Debited from the Bank. This maximum number of Credits may be modified by the age, and status of construction of the Mitigation areas. The U.S. Army Corps of Engineers (“Corps”) and the Virginia Department of Environmental Quality (“DEQ”) shall determine the appropriate and specific number of Mitigation Credits necessary to be Debited against the Bank to achieve no net loss of Functions and values during the permit process based upon their use of methods determined to be appropriate by said agencies, of the impact areas and the status of this Bank.

II. Mitigation Credit Creation

A. Pre- Construction

Mitigation Credits shall be created by development of a wetland Mitigation area with upland buffers in substantial conformance with the Mitigation Site Plan described in Exhibit C (Bank Development Plan) of the Banking Instrument. The number of Credits created by this Mitigation Bank shall initially be based upon the Bank Development Plan. Credits may then be adjusted by the MBRT based upon the results of the monitoring program described in Section V of the Banking Instrument, if and only if, as-built conditions differ substantially from the areas projected in the Bank Development Plan projections as determined by the MBRT acting through the MBRT Chair. Adjustments may include changes in the number of available Credits, credit composition, or minimum credit ratios associated with use of the Bank. However, this adjustment shall not be permitted to increase the number of Credits available from upland reforestation as originally proposed in the final construction documents. If such areas cannot be modified so as to create the planned wetlands habitats, no Credits will be available from such areas. Each acre of land area within the Property described in Exhibit B shall be designated by the Mitigation Site Plan as to which types of land forms, as classified by the Cowardin System, shall be restored or created by grading and/or water impoundment. The number of Credits created by this plan shall be determined by community or cover type.

The exact number of Credits created is determined by the Mitigation Site Plan and adjusted based upon final as-built conditions. The number of Credits is estimated to be: _____.

B. Post-Construction

During or after the fifth growing season, the Corps, acting in consultation with the

MBRT, may assess the Functions and values of this ecological system if part or all of the site fails to meet Bank Success Criteria (or when requested to do so by the Sponsor). The MBRT may issue a written determination to the Sponsor that due to the demonstration of successful performance, the number of Credits attributable to this Mitigation Bank are increased or decreased to reflect the Functions and values provided.

C. Open Water

Any created Open Water areas shall be accounted for separately from the wetland Credits available at the _____ Wetlands Bank. When an impact in the service area of the Bank to Open Water occurs, DEQ and/or the Corps may allow a permittee to purchase a portion of any open water on the Mitigation Bank site as off-site Mitigation for said impact permitted under permits issued under the Clean Water Act and/or Virginia Water Protection Permit.

III. Accounting Procedures

- A. The Sponsor shall comply with the accounting procedures described in Section V of the Banking Instrument and the quantitative assessment of Credits and Debits for permitted impacts as described herein.
- B. In no event shall the cumulative total area of impacts to Waters of the U.S. permitted to use Credits from the Mitigation Bank exceed the total area of Waters of the U.S. created by this Mitigation Bank.
- C. If the Mitigation Bank is constructed in Phases, the accounting of Credits shall duly reflect this phasing of work.

Exhibit F

The restrictive covenant should mirror the acceptable land uses contained in the MBI as well as providing for support activities and the ability to modify the covenant with the approval of the MBRT. One example is attached:

DECLARATION OF RESTRICTIONS

OF

(Owner)

_____, VIRGINIA

THIS DECLARATION OF RESTRICTIVE COVENANTS, is made this ____ day of _____, 2003, by _____, Owner.

WHEREAS, (_____) is the owner of the Property more fully described on Exhibit A attached hereto; it being the same Property conveyed to _____, by deed from _____, dated _____, and duly recorded in the Clerk's Office of the _____ of _____ in Deed Book _____, at page _____).

WHEREAS, (_____) desires to comply with the respective conditions of the Banking Instrument between: the _____; the Mitigation Bank Review Team (the "MBRT") which consists of the U.S. Army Corps of Engineers, Norfolk District (the "Corps"); the Environmental Protection Agency ("EPA"); the U.S. Fish and Wildlife Service ("USFWS"); and the Virginia Department of Environmental Quality ("DEQ"), the Virginia Department of Game and Inland Fisheries ("VDGIF"), the Virginia Marine Resources Commission ("VMRC") and the Virginia Institute of Marine Sciences ("VIMS"); dated _____, 20__, by imposing this Restrictive Covenant on the Property that may consist of preserved wetlands, restored wetlands, enhanced wetlands, created wetlands, uplands, and areas to be converted into wetlands.

WHEREAS, (_____) desires to impose on said Property restrictive covenants expressing (_____) 's intent to preserve _____ acres of said Property as shown on Exhibit B and as described as _____ Bank in perpetuity as detailed below. The Owner desires to comply with the respective conditions of the Banking Instrument by imposing this Restrictive Covenant on the Mitigation Bank located on the Property. These covenants are imposed by Owner freely and voluntarily.

NOW THEREFORE THIS DECLARATION WITNESSETH: (_____) does hereby declare, covenant and agree, for itself and its successors and assigns, that said Property described as _____ shown on Exhibit B shall be hereafter held, leased, transferred, and sold subject to the following conditions and restrictions which shall run with the land and be binding on all parties and persons claiming under them.

Covenants and Restrictions.

The Property described as _____ shown on Exhibit B attached hereto shall be preserved in perpetuity in its natural state, by prohibiting the following activities:

1. Destruction or alteration of the area shown on Exhibit B except:

- (a) alteration necessary to construct the wetland Mitigation areas and associated improvements, such as dams, outlet structures and spillways, nature trails, and interpretive stations, proposed to be built by _____, or its successors, and/or assigns, for the "____ Bank";
- (b) alteration necessary to ensure the success of the _____ Bank and in conjunction with the construction, reconstruction or maintenance of the constructed Mitigation areas;
- (c) alteration to construct structures such as walkways, boardwalks, foot trails, wildlife observation or management structures, benches, observation decks, picnic tables, fence posts (spaced in a manner so that neither the posts nor the fence itself prevents the natural movement of water), fish ladders, and, ecological, biological, hydrological or chemical monitoring, observation or management equipment including, without limitation, monitoring wells, water control weirs or interpretive stations, or other structures approved by the MBRT, provided that
 - (i) any such structures permit, and do not impede, the natural movement of water, and
 - (ii) such facilities are constructed and maintained in accordance with all applicable federal and states laws;
- (d) addition of signs constructed in public right of ways by or on behalf of the Virginia Department of Transportation or other governmental agencies;
- (e) removal of vegetation (where not precluded by federal or state law) when conducted for
 - (i) removal of noxious or invasive plants or
 - (ii) limited aesthetic modifications not involving clearing or removal of trees or limbs greater than three (3) inches in caliber unless dead, dying or diseased, -
- (f) planting of native species of wetlands plants by hand for aesthetic landscaping or screening purposes; and
- (g) alteration authorized by the Banking Instrument and by the Corps and/or the DEQ under Permit Number _____ and other activities permitted by the DEQ and the Corps pursuant to the Virginia Water Protection Permit program and Section 404 of the Clean Water Act, respectively; and/or
- (h) alteration as reasonably necessary to comply with state or federal law or appropriate court order.

2. Construction, maintenance or placement of any structures or fills including but not limited to buildings, and mobile homes, other than those, which currently exist.

3. Ditching, draining, diking, damming, filling, excavating, grading, plowing, flooding/ponding, mining, drilling, placing of trash and yard debris or removing/adding topsoil, sand, or other materials (except as may be necessary on a case-by-case basis with prior written approval by the MBRT) other than any authorized under the Banking Instrument;

4. Permitting livestock to graze, inhabit or otherwise enter the Preservation area.

(Delete if not appropriate)

5. Harvesting, cutting, logging, and pruning of trees and plants, or using fertilizers and spraying with biocides other than what is authorized by the Banking Instrument (except as may be necessary on a case-by-case basis with prior approval by the MBRT);
6. Utilizing a non-reporting Nationwide Permit or State Program General Permit under Section 404 of the Clean Water Act or state general permits under VWPP regulations to impact any State Waters on the Property. Notification shall be required for the use of any Nationwide Permit, State Program General Permit, Regional Permit, or state general permit under VWPP regulations.

Amendment

The covenants contained herein shall not hereafter be altered in any respect without the express written approval and consent of the Owner or its successor in interest and the MBRT. The Owner or its successor may apply to the MBRT for vacation or modification of this declaration; however, after recording, these restrictive covenants may only be amended or vacated by a recorded document signed by the signatory members of the MBRT and the Owner or its successor in interest.

Compliance Inspections and Enforcement

The MBRT, and its authorized agents shall have the right to enter and go on the Property to inspect the Property and take actions necessary to verify compliance with these restrictive covenants. The restrictive covenants herein shall be enforceable by any proceeding at law or in equity or administrative proceeding by the MBRT, including the Corps or DEQ. Failure by any agency (or owner) to enforce any covenant or restriction contained herein shall in no event be deemed a waiver of the right to do so thereafter.

Separability Provision

The provisions hereof shall be deemed individual and severable and the invalidity or partial invalidity or unenforceability of any one provision or any portion thereof shall not affect the validity or enforceability of any other provision thereof.

Consent of Lender and Trustee (if applicable)

Owner is the maker of a note dated _____, secured by, among other things, a deed of trust dated _____, from Owner to _____, as trustee, recorded in the Clerk's office at Deed Book _____, Page _____. For the benefit of _____ Bank (the "Deed of Trust"), _____, trustee joins herein for the sole purpose of subordinating the lien, dignity and priority of the Deed of Trust to these restrictive covenants. _____ Bank joins herein for the sole purpose of consenting to trustee's action.

WITNESS the following signature the day and year first above written.

[_____]

BY: Its General Partner

BY: _____

TITLE: _____

Commonwealth of Virginia, City of _____, to wit:

I, _____, a notary public for the state and city aforesaid, do certify that [Name] [Title] whose name was signed on _____, 20__ in his capacity on that date to the foregoing document has acknowledged said document and signature before me in the city aforesaid.

Given under my hand and notarial seal this _____ day of _____, 20__.

Notary Public

My commission expires _____.

Signature block for Bank and Trustee, if applicable.

Exhibit A

Legal description of Property.

Exhibit B

Plat Map and /or Legal description of preserved area. If Plat is oversized and will be recorded separately, Exhibit B should contain a description that includes the reference to the Plat Book and Page number where the plat is recorded.

Exhibit G**Escrow Agreement**

THIS ESCROW AGREEMENT ("Escrow Agreement") is made and entered into as of the _____ day of _____, 20__ by and among _____, a Virginia limited liability Corporation ("Sponsor"), and _____ (Escrow Agent) specifically described herein, governing the design, construction, monitoring, maintenance, and use of Mitigation Credits on a parcel of land and said Escrow Agreement contains the agreements among the parties.

STATEMENT OF PURPOSE

Sponsor has entered into the _____ Wetland Mitigation Banking Instrument with the _____ Mitigation Bank Review Team (MBRT), which consists of the U.S. Army Corps of Engineers, Norfolk District (the "Corps"); the Environmental Protection Agency ("EPA"); the U.S. Fish and Wildlife Service ("USFWS"); the Virginia Department of Environmental Quality ("DEQ"), the Virginia Department of Game and Inland Fisheries ("VDGIF"), the Virginia Marine Resources Commission ("VMRC") and the Virginia Institute of Marine Sciences ("VIMS"), represented by its Chair, the Corps, dated as of the _____ day of _____, 20__ ("Banking Instrument"), consisting of approximately _____ acres of land located in _____ County, Virginia, as more particularly described in the Banking Instrument (the "Property"). The Sponsor desires to have the Escrow Agent hold certain funds in escrow and distribute said funds resulting from the sale of Mitigation Credits as required under the Banking Instrument and pursuant to the terms of this Escrow Agreement.

NOW, THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. **Appointment.** The Sponsor hereby appoints the law firm or title company of _____ as Escrow Agent hereunder, and by its execution thereof, _____ agrees to accept such appointment.
2. **Mitigation Sale Proceeds.** Sponsor shall cause all funds from any Mitigation sales relating to the Property to be delivered and deposited in escrow with the Escrow Agent as required by Section IV.D. of the Banking Instrument. The Escrow Agent agrees to immediately deposit said funds in an escrow account at a federally insured depository institution, and to hold and only disburse said funds, and any interest earned thereon (together the "Mitigation Sales Proceeds") as hereinafter provided.
3. **Notification of Receipt of Mitigation Sale Proceeds.** Upon receipt of any Mitigation Sale Proceeds, Escrow Agent shall provide written confirmation to the

Sponsor of receipt of such funds. The Sponsor shall forward copies of this confirmation to the following organizations:

4. Notification of Disbursement of Funds from Escrow Account. The Sponsor, the MBRT, acting through the Chair, and/or the Long-Term Steward (if one has been designated) shall only request that Escrow Agent disburse said funds in accordance with the criteria established in Sections IV.D., IV. E., and VI. E. of the Banking Instrument as necessary. The Escrow Agent agrees that it shall only honor requests for disbursements that are made in writing. A copy of each request for disbursement shall be simultaneously sent by the Sponsor, MBRT, or Long-Term Steward to:

Upon receiving written approval from the MBRT Chair for the requested disbursement, the Escrow Agent shall release said funds requested by the Sponsor, the MBRT, or the Long-Term Steward (If one has been designated) within 5 days of receiving said approval.

5. Instructions. Escrow Agent is instructed and directed by the parties to comply with Section IV.D. of the Banking Instrument and by its execution hereof agrees to comply with Section IV.D. of the Banking Instrument.

6. Duties of Escrow Agent/Exculpation. The Sponsor agrees that in performing any of its duties under this Agreement, that Escrow Agent shall not be liable to the Sponsor for any loss, costs or damage that may incur as a result of its service as Escrow Agent hereunder, except for any loss costs or damage arising out of its willful default or negligence. Accordingly, Escrow Agent shall not incur any liability with respect to (a) any action taken or admitted to be taken in good faith upon advice of its counsel given with respect to any questions relating to its duties and responsibilities, or (b) to any action taken or admitted to be taken in reliance upon any document, including any written notice of instruction provided for in this Escrow Agreement, not only as to its due execution and validity and effectiveness of its provisions, but also as to the truth and accuracy of any information contained therein, which Escrow Agent shall in good faith believes to be genuine, believes to have been signed or presented by a proper person or persons and, in good faith believes to conform with the provisions of this Escrow Agreement.

7. Indemnification. The Sponsor hereby agrees to indemnify and hold harmless the Escrow Agent and any and all of its partners acting hereunder, against any and all losses, claims, damages, liabilities and expenses, including, without limitation, reasonable attorneys' fees and disbursements, which may be imposed upon or incurred by Escrow Agent in connection with its service as Escrow Agent, unless such losses, claims, damages, liabilities and expenses are the result of Escrow Agent's willful default or negligence.

8. Disputes. In an event of dispute between the Sponsor and the MBRT or the MBRT Chair, sufficient in the discretion of Escrow Agent to justify its doing so, Escrow Agent shall be entitled to tender unto the registry or custody of any court of

competent jurisdiction all money or Property held by it under the terms of this Escrow Agreement, together with such legal pleadings as it deems appropriate and immediately thereupon it should be discharged from all duties and responsibilities hereunder.

IN WITNESS WHEREOF, the undersigned have caused this instrument to be duly executed and sealed as of the day and year first above written.

By: _____
XXXXXX

AND BY: _____
XXXXXXXX